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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HERIBERTO GARCIA et al., Defendants and Appellants.	B211909 (Los Angeles County Super. Ct. No. NA074833)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed in part and reversed in part.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant Heriberto Garcia.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant Eva Daley.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Heriberto Garcia and Eva Daley (collectively, Appellants) appeal their convictions for second degree murder (Pen. Code,[1] § 187, subd. (a)), with true findings on gang enhancement allegations (§ 186.22, subd. (b)(1)). They raise the following arguments on appeal:[2] (1) the trial court erred in instructing the jury that murder could be a natural and probable consequence of simple assault; (2) former Judicial Counsel of California Criminal Jury Instruction (CALCRIM) No. 403 is impermissibly ambiguous on the natural and probable consequences theory of murder as an aider and abettor; (3) the trial court abused its discretion in admitting the entirety of the accomplices' tape recorded statements to the police; (4) the prosecutor committed prejudicial misconduct in misstating the sentence range for a murder conviction; (5) the evidence was insufficient to support the true findings on the gang enhancement allegations; and (6) CALCRIM No. 220 is legally deficient in failing to provide that each element of a charged crime must be proven beyond a reasonable doubt. We affirm the judgment as to Garcia, but reverse the judgment as to Daley.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In a single-count information, the Los Angeles County District Attorney charged Garcia and Daley with the murder of Jose Cano (§ 187, subd. (a)). The information also alleged that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). Garcia and Daley each pleaded not guilty to the murder charge and denied the gang enhancement allegation.

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

[2] In their appeals, Garcia and Daley join in each other's arguments to the extent that those arguments accrue to their benefit.

II. The Prosecution Evidence

A. The Stabbing Death of Cano

Thirteen-year-old Jose Cano was a member of a Long Beach area gang known as the "Latin Thugs" or "LTs." Before joining the LTs, Cano was in a rival gang known as the "Loco Marijuana Smokers" or "LMS." The two gangs were primarily comprised of teenagers. In the early evening of June 25, 2007, Cano and some other LTs congregated at an apartment complex where Daley and her son, Mauricio Rivera, lived. The LTs were being disruptive and disrespectful to Daley and other residents by yelling at them and throwing lighted flares in their direction. Rivera was at home at the time and was hanging out with Garcia. Both Rivera and Garcia were members of the LMS and were familiar with Cano. Garcia knew that Cano was once in the LMS and now belonged to the LTs. Rivera and Cano also had a history. In December 2006, six months prior to Cano's death, Rivera was stabbed. Although a suspect was not apprehended, a witness saw Rivera with Cano immediately before the stabbing, but did not know if Cano was responsible for Rivera's injury.

On June 25, 2007, after the LTs left the area, Rivera contacted several fellow members of the LMS and told them about the LTs' conduct toward his mother. A group of at least seven LMS members gathered at Daley's home, including Rivera, Garcia, Carlos Jimenez, Juan Bautista, Alejandro Flores, Jakkia Ross, and Edwin Moran. Daley drove her white Chevy Tahoe to pick up Bautista, Ross, and Moran, and brought them back to her home. Other LMS members later arrived on their own. While the group was gathered at Daley's home, a police helicopter began passing by and shining its lights in the surrounding neighborhood. The group of LMS members got into Daley's Tahoe and she drove them out of the immediate area.

Four of the group members testified at trial and provided varying accounts of their purpose in departing from Daley's home. Bautista testified that they were looking for LTs to fight as payback for the LTs' disrespectful behavior toward Daley, and that some in their group had bats. Flores likewise asserted that they went looking for the LTs because Daley had been disrespected, and he acknowledged that he took a stick with him

when they left. In their testimony, both Ross and Moran stated that the group did not plan to retaliate against the LTs and their sole purpose in driving around the area was to cruise. However, in a prior interview with the police, Ross recounted that the plan was to "rumble" with the LTs because they had disrespected Daley, and that two LMS members were armed with mini wooden bats. In his police interview, Moran indicated that the group's intent was to fight because the LTs had disrespected Daley or the mother of another LMS member, and because a LT member had stabbed Rivera in the recent past. Moran also told the police that Cano may have been the person who stabbed Rivera, but he was not aware of that fact when they went to fight the LTs. Garcia did not testify at trial, but in a prior statement to the police, he admitted that the group was looking for the LTs "to beat [them] up," and that he was armed with a pocketknife at the time.

As Daley was driving, the group saw one or two members of the LTs standing on Henderson Avenue. The group exited Daley's Tahoe, approached one of the LTs, and asked him for his gang affiliation. They decided to leave him alone, however, because there were other people nearby who might call the police. After the group got back into her vehicle, Daley continued driving them around the Long Beach area. When Daley drove by a park on 14th Street and Pine Avenue, the group saw Cano and two or three other LTs standing on the corner with some girls. Daley stopped the Tahoe in a nearby alley and told the group to get out. Each of the teenagers exited the vehicle and ran down the alley toward the LTs.

As the group approached the LTs, Ross yelled "LMS." The LTs immediately disbanded and ran in different directions with Cano running toward the park. Garcia, Bautista, Moran, and at least two other LMS members chased Cano to the park and then circled him. The group began punching and kicking Cano and continued beating him after he fell to the ground. While Cano was on the ground, Garcia stabbed him with the knife. Bautista told the police that he saw Garcia stab Cano three times. In his police interview, Garcia insisted that he "poked" Cano with the knife only twice and that another LMS member known as "Listo" stabbed him with a shank. Flores, Ross, and

Moran also identified a person named "Listo" as a participant in the assault; however, the police were never able to locate any LMS member who went by that moniker.

Immediately after the assault, the group ran back to the alley where Daley was waiting in the Tahoe. Garcia's hand was bleeding. In their interviews with the police, three of the accomplices stated that, once inside the vehicle, Garcia told the others that he had stabbed one of the LTs. Whereas Flores reported that Garcia said he "shanked that guy" or "stabbed that guy," Ross recounted that Garcia told the group, "I think I stabbed him." Moran, on the other hand, recalled Garcia saying, "I got him! I shanked that vato! I shanked that fool!" Moran also told the police that Garcia admitted to stabbing the victim seven times. According to the accomplices, they were all shocked that Garcia had stabbed anyone because they did not know beforehand that he had brought a knife to the fight. Two of the accomplices, Bautista and Ross, related that Daley did not say anything when the group returned to her vehicle after the assault. However, two other accomplices, Flores and Moran, reported that Daley was upset when the group came back and yelled at them for jumping out of the car and getting into a fight. Once the group was reassembled in her vehicle, Daley drove them to their respective homes.

Other eyewitnesses to the events surrounding the assault also testified at trial. Carlos Lopez was walking his dog near the park when he saw a white Chevy Tahoe stop suddenly in an alley. Six or seven people exited the vehicle and ran down the alley out of Lopez' sight. The group consisted of young teenage males and one adult female. After a few minutes, Lopez observed the female enter the vehicle, start the engine, and shout, "Let's go. Let's go. Come on. Come on." Seconds later, he saw the group of young men run back through the alley and get in the vehicle. Lopez heard one of them say, "We slashed him good." The Tahoe then drove away.

Tracie Mendez and Milagros Mendoza were standing beside Cano shortly before the assault. The girls were friends with both LMS and LT members. Mendez reluctantly testified that she saw a group of males, including Garcia and Rivera, run from the alley and approach Cano. The group chased Cano as he fled toward the park and then formed a circle around him. Mendez could not see whether Cano was assaulted by the group, but

she heard them yelling "LMS" as they left. Mendoza similarly testified that she and her friends were waiting for a ride when she saw a group of young men running toward them. The group, which included Garcia, Rivera, and Ross, chased Cano as he ran toward the park. They then crowded around Cano and began to beat him. After the assault, Mendoza saw Cano on the ground bleeding and struggling to breathe. According to Mendoza, the group yelled "LMS" when they first approached and again when they fled the scene. While Cano was being transported to a local hospital by a family friend, he repeatedly told her "LMS." Cano later died at the hospital.

Cano's cause of death was multiple stab wounds. He sustained a total of nine stab wounds to various parts of his body, including one fatal stab wound that perforated his heart. There was no evidence that Cano suffered any other trauma such as bruises from being punched or kicked, and the coroner was unable to determine whether the stab wounds were caused by one or two weapons. During a subsequent search of Daley's Tahoe, multiple blood stains were found inside the vehicle. Garcia's DNA was matched to the blood stains found on a seat belt and seat cushion, and Cano's DNA was matched to the blood stain found on a headrest.

On June 28, 2007, three days after the assault, homicide detectives interviewed Daley. She denied all knowledge of the incident at that time. At Daley's request, she was re-interviewed by the detectives the following day. During that interview, Daley initially stated that she had driven a group of her son's friends to another residence and then returned home without making any stops by the park. She later admitted, however, that she did drive the group to an area by the park, but denied that she had any prior knowledge that they were planning a fight. Daley said that she thought the group wanted to go to a nearby store. She also explained that, when they unexpectedly jumped out of her Tahoe, she stopped the vehicle and walked a few feet away because she was worried about her son. Daley told the detectives that she wanted to leave the area as soon as her son returned but had to wait because the rest of the group started to reenter her vehicle. Daley asserted that she did not know anyone had been killed until the following day.

While Daley was in police custody, she made 164 calls over a four-day period from the Long Beach City Jail. During those calls, Daley asked Rivera's girlfriend to find out what information Rivera had provided to the police so that she could make sure their stories matched. Daley also advised Rivera's girlfriend to talk to the other boys who were involved in the incident or their mothers and tell them not to say anything. During one call, Rivera's girlfriend told Daley that she heard from the detectives that there was a videotape of Daley's vehicle in the alley. In response, Daley instructed her to check the alley for surveillance cameras to determine if the detectives were telling the truth.

B. The Gang Expert Testimony

Officer Chris Zamora testified at trial as an expert on criminal street gangs. He described the LMS as a predominately male Hispanic gang in the Long Beach area. The LMS had formed within the last few years and had 20 to 30 members who were mostly juveniles. The main rival of the LMS was the LTs, another young Hispanic gang in the Long Beach area. As younger gangs, both the LMS and the LTs had aligned themselves with older and larger criminal street gangs. The LMS was associated with the 18th Street gang and the LTs were affiliated with the East Side Longo gang. The two younger gangs were in an ongoing battle for the same geographic territory in Long Beach, and their members often lived near one another and attended the same schools. Officer Zamora identified Garcia as a self-admitted and active member of the LMS based on Garcia's tattoos and prior contacts with the police. He identified Cano as a member of the LTs who previously had been a member of the LMS. Officer Zamora did not know whether Daley was in a gang, but opined that a person did not need to be a gang member to participate in an act for a gang's benefit.

Officer Zamora testified that he was aware that Ross and Flores were also self-admitted members of the LMS. Ross previously had been convicted of possessing a concealed firearm in January 2007, and Flores had been convicted of driving a stolen vehicle in March 2006. When asked about the common activities of the LMS, Officer Zamora answered that they included physical assault, auto theft, auto burglary, strong armed robbery, and illegal firearm possession. He further opined that, based on the facts

of the case, Garcia's crime against Cano would have been committed for the benefit of the LMS. Officer Zamora found it significant that several LMS members participated in the assault, one of them shouted "LMS" during the assault, the assault was against a rival LT member, and the prior stabbing of Rivera was part of an ongoing battle between the two gangs. Officer Zamora explained that the crime directly benefited the LMS by elevating the reputation of Garcia within the gang and the reputation of the gang within the local community. It was also his opinion that Daley's participation in the crime would have been for the benefit of the LMS because she played a crucial role as the getaway driver in an attack against a rival gang. Officer Zamora characterized Daley's involvement in the crime as an integral part of the gang's plan.

III. The Defense Evidence

Daley testified on her own behalf. She was the mother of three minor children. In the early evening of June 25, 2007, Daley heard yelling in the alley near her apartment. When she went outside, she saw a group of teenagers running through the alley and throwing flares at her fellow residents. Daley was not angry, but was afraid. At Rivera's request, Daley agreed to pick up a few of his friends in her car. When she returned home with three of Rivera's friends, she saw that seven or eight other boys had congregated outside around the apartment complex. Daley insisted that the boys never came inside her home that day.

Daley further testified that Rivera later asked her to drive his friends back to their homes. At one point during the drive, Daley stopped the car at a corner so that the boys could speak to another friend that they saw on the street. As she continued driving them home, someone in the group suddenly jumped out of the car. Daley stopped the car as everyone else exited and started running. She did not follow them, but stepped a few feet from her vehicle because she was worried about her son's safety. She then reentered the car and started the engine while trying to decide what to do. When Rivera and the rest of the group returned, Daley drove them to their homes. According to Daley, she initially lied to law enforcement about her involvement in the incident because she was afraid for

her son, but she later agreed to tell the detectives the truth. A character witness for Daley testified that she was a peaceful person with no history of violence.

IV. Verdict and Sentencing

Following a six-day trial, the jury found both Garcia and Daley guilty of second degree murder. The jury also found true the gang enhancement allegations. The trial court later sentenced Garcia and Daley to terms of 15 years to life on the murder charge and stayed the terms on the gang enhancements. Garcia and Daley have each filed a timely notice of appeal.

DISCUSSION

I. Murder as a Natural and Probable Consequence of Simple Assault

Daley contends that the trial court erred when it instructed the jury that she could be found guilty of murder under the natural and probable consequences doctrine if she aided and abetted the commission of a simple assault. In instructing the jury on the natural and probable consequences doctrine, the trial court stated in part: "To prove the defendant is guilty of murder under this theory, the People must prove that . . . [d]uring the commission of the crime of murder, a co-participant in that murder committed the crime of assault, or assault with force likely to produce great bodily injury, or assault with a deadly weapon. And under all of the circumstances a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of assault or assault with force likely to produce great bodily injury or assault with a deadly weapon." Daley claims that the instruction was erroneous because, as a matter of law, murder cannot be a natural and probable consequence of simple assault. She is incorrect.

"[U]nder the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Thus, "if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even

if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*Ibid.*) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*).) "A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury. [Citations.]" (*Ibid.*)

The California Supreme Court recently rejected Daley's legal argument, holding that murder can be a natural and probable consequence of simple assault under certain circumstances such as a gang attack. (*Medina, supra,* 46 Cal.4th at p. 916.) In *Medina,* the defendants and the victim were members of rival gangs. A verbal challenge by the defendants led to a fistfight, after which one of the defendants shot and killed the victim as he was driving away from the scene. The Court of Appeal reversed the convictions of the non-shooting defendants on the ground that there was insufficient evidence that murder was a natural and probable consequence of the simple assault that they aided and abetted. (*Ibid.*) The Supreme Court reversed the Court of Appeal because "a rational trier of fact could have concluded that the shooting death of the victim was a reasonably foreseeable consequence of the assault." (*Ibid.*)

The Supreme Court reasoned that "the ultimate factual question is one of reasonable foreseeability, to be evaluated under *all* the factual circumstances of the case." (*Medina, supra*, 46 Cal.4th at p. 927.) Under the facts of the case, "the jury could reasonably have found that a person in defendants' position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable as [the victim] was retreating from the scene. [Citation.]" (*Id.* at pp. 922-923.) As the Court also noted, "in the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed. [Citation.]" (*Id.* at p. 924; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1,

10 [fatal shooting during fistfight between rival gangs was a natural and probable consequence of gang-related fight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055-1056 [shooting of rival gang member during retreat from fight was a natural and probable consequence of assault despite defendant's lack of knowledge that fellow gang member was armed]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1375-1376 [defendant's punching of victim during gang-related fight foreseeably resulted in fatal shooting of victim by fellow gang member]; *People v. Montano* (1979) 96 Cal.App.3d 221, 226-227 [defendant could be liable for murder as an aider and abettor even if he only encouraged battery of victim and had no knowledge of his gang's plan to shoot victim].) Instead, "[t]he issue is 'whether, under all of the circumstances presented, a reasonable person in the defendant's position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.' [Citation.]" (*Medina*, *supra*, at p. 927.)

Daley's argument that, as a matter of law, murder cannot be a natural and probable consequence of simple assault is without merit. The trial court accordingly properly instructed the jury that Daley could be convicted of murder as an aider and abettor of a simple assault if it found that murder was a natural and probable consequence of that simple assault.

II. Former CALCRIM No. 403 - Natural and Probable Consequences Doctrine

Alternatively, Daley argues that even if murder can be a natural and probable consequence of simple assault, the trial court still erred in instructing the jury on the natural and probable consequences doctrine with CALCRIM No. 403 because the instruction was unconstitutionally ambiguous. Daley challenges the following language in former CALCRIM No. 403 as read to the jury at trial: "The People are alleging that a defendant originally intended to aid and abet either assault or assault with force likely to produce great bodily injury or assault with a deadly weapon. The defendant is guilty of murder if you decide that the defendant aided and abetted one of these crimes and the murder was a natural and probable result of one of these crimes. However, you do not

need to agree about which of these crimes the defendant aided and abetted."[3] Daley asserts that the instruction was incorrect on the law because it allowed the jury to find her guilty of murder as an aider and abettor of a specific target crime such as simple assault without finding that murder was a natural and probable consequence of that target crime. We agree that the version of the instruction given to the jury was impermissibly ambiguous.

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) When instructions are claimed to be conflicting or ambiguous, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 873.) "'[W]e do not view the instruction in artificial isolation but rather in the context of the overall charge. [Citation.] For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075.) The arguments of counsel must also be considered in "assessing the probable impact of the instruction on the jury. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

The Attorney General contends that Daley has forfeited the issue on appeal by failing to object to CALCRIM No. 403 in the trial court. Daley, on the other hand, claims that defense counsel did assert a timely objection to the instruction at trial. The reporter's transcript reflects that following an off-the-record conference with counsel, the trial court stated that it had decided "over your objection, defense counsel, to add assault

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[3] The written instructions provided to the jury omitted the reference to the target crime of simple assault from this portion of CALCRIM No. 403, but similarly stated as follows: "The People are alleging that a defendant originally intended to aid and abet either assault with force likely to produce great bodily injury or assault with a deadly weapon. [¶] The defendant is guilty of murder if you decide that the defendant aided and abetted one of these crimes and that murder was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted."

as one of the predicates to the consequences instruction." There was no further discussion about the nature of defense counsel's objection to the instruction. However, even assuming this was not a timely objection, a criminal defendant's claim that an instruction misstated the law or violated his or her right to due process of law "is not of the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

As discussed, under the natural and probable consequences doctrine, "a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 254 (*Prettyman*).) Thus, to convict a defendant of a nontarget crime as an aider and abettor, the jury must find that the defendant assisted or encouraged the commission of a target crime, the defendant's confederate committed an offense other than the target crime, and the nontarget offense committed by the confederate was a natural and probable consequence of the target crime that the defendant assisted or encouraged. (*Ibid*.) The jury need not unanimously agree on the specific target crime that the defendant aided and abetted, but, at trial "each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a *criminal act*, and that the offense actually committed was a natural and probable consequence of that act." (*Id*. at p. 268.) To assist the jury in properly applying the doctrine, the trial court's instructions to the jury must identify and describe the specific target crime or crimes that the defendant allegedly aided and abetted. (*Id*. at pp. 266-267.)

In this case, we conclude that the natural and probable consequences instruction given to the jury was impermissibly ambiguous in identifying and describing the target crimes, because it failed to instruct the jury that, if it found that Daley aided and abetted a specific target crime, it also had to find that murder was a natural and probable consequence of that specific target crime. Instead, the written and oral versions of CALCRIM No. 403 given to the jury used the phrase "one of these crimes" to describe

both the target crime that Daley allegedly aided and abetted and the target crime that must have naturally and probably resulted in murder. On its face, the instruction accordingly allowed the jury to convict Daley of murder based on a finding that she aided and abetted only a simple assault (but did not aid and abet an assault likely to produce great bodily injury or assault with a deadly weapon), and that murder was a natural and probable consequence of an assault likely to produce great bodily injury or assault with a deadly weapon (but was not a natural and probable consequence of a simple assault). A murder conviction based on such a finding by the jury would be contrary to the law.

Notably, CALCRIM No. 403 has been revised since Daley's conviction to clarify this point. The current version of the instruction provides, in pertinent part: "The People are alleging that the defendant originally intended to aid and abet [insert target offenses]. If you decide that the defendant aided and abetted *one of these crimes* and that [insert non-target offense] was a natural and probable consequence *of that crime*, the defendant is guilty of [insert non-target offense]. You do not need to agree about which of these crimes the defendant aided and abetted." (Italics added.)[4] CALCRIM No. 403 now reflects the proper definition of the natural and probable consequences doctrine as described by the California Supreme Court. (*Prettyman, supra*, 14 Cal.4th at p. 269.)

While acknowledging that the instruction could have been more clearly worded, the Attorney General asserts there was no reasonable likelihood the jury misunderstood or misapplied the instruction in the manner suggested by Daley. The Attorney General points out that neither the prosecution nor the defense argued to the jury that Daley could be convicted of murder if it found that she aided and abetted a specific target crime, but

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[4] The revised language of CALCRIM No. 403 is also consistent with CALJIC No. 3.02, which reads in relevant part: "You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of *an identified and defined target crime* and that the crime of [charged crime] was a natural and probable consequence of the commission *of that target crime*." (Italics added.)

that murder was not a natural and probable consequence of that target crime. Instead, the prosecution's theory of the case was that murder was a natural and probable consequence of all three possible target crimes (i.e., simple assault, assault likely to produce great bodily injury, and assault with a deadly weapon). But merely because the prosecutor contended that murder was a natural and probable consequence of simple assault under the circumstances of the case does not mean that the jury based its guilty verdict on that particular legal theory.

The Attorney General suggests that the closing argument of defense counsel also served to clarify the correct reading of the instruction. In describing the natural and probable consequences doctrine to the jury, Daley's attorney argued: "And then when you decide what the target crime was, and [the prosecutor] correctly stated the law to you that it doesn't have to be the same, some of you may feel it is assault with a deadly weapon, or some of you may feel it was assault. I tell you, for you people that decide that it was an assault, maybe all of you, that was contemplated that was a target crime if you for some reason you believe that she knew there was going to be a fight, then you have to decide whether a murder is a natural and probable consequence foreseeable to a person in the same situation as Mrs. [Daley] was. Before you ever get to convict her, you have to decide that murder is the natural and probable consequence of a fist fight." While defense counsel's argument was an accurate statement of the law, it was not a model of clarity. Hence, we cannot say that such argument was sufficient to correct the ambiguity in the oral and written instruction issued by the trial court.

As our Supreme Court has observed, "[t]o apply the 'natural and probable consequences' doctrine to aiders and abettors is not an easy task. The jury must decide whether the defendant (1) with knowledge of the confederate's unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or

facilitated." (*Prettyman*, *supra*, 14 Cal.4th at p. 267.) Due to the complexity in the law, jury instructions must accurately "describe[e] each step in this process [to] ensure proper application by the jury of the 'natural and probable consequences' doctrine." (*Ibid*.) The version of CALCRIM No. 403 given to the jury failed to do so here.

The Attorney General argues that any instructional error was harmless beyond a reasonable doubt because the evidence was overwhelming that Daley aided and abetted a simple assault. However, to convict Daley of murder under this legal theory, the jury also must have found that murder was a natural and probable consequence of the simple assault that Daley aided and abetted. It is true, as the Attorney General asserts, that the jury reasonably could have found that Daley aided and abetted a simple assault when she drove her son and his friends to a fistfight with a rival gang, and that murder was a natural and probable consequence of that simple assault. However, due to the ambiguity in the instruction, the jury also reasonably could have found that Daley aided and abetted a simple assault through her participation in the gang fight, and that murder was not a natural and probable consequence of simple assault, but was a natural and probable consequence of assault with a deadly weapon, the type of assault actually committed by Garcia during the fight. Based on the record before us, we cannot determine which legal theory the jury relied on in reaching its verdict.

Where a jury is instructed on alternate theories of liability, some of which are legally valid and others which are not, reversal is required unless there is a basis in the record for concluding that the jury actually based its verdict on a legally valid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "'Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.'" (*Id.* at p. 1125.) Because we cannot conclude from the

record that the jury based its verdict against Daley on a legally valid theory, Daley's conviction for second degree murder must be reversed.[5]

III. Admissibility of the Accomplices' Prior Police Statements

Garcia asserts that the trial court abused its discretion in admitting into evidence the prior statements that the four testifying accomplices made to the police. He reasons that the accomplices' police statements were inadmissible hearsay and that any portions of the statements that may have fallen within an exception to the hearsay rule did make the entire statements admissible. We conclude that the trial court erred in admitting the entirety of the accomplices' prior police statements, but that the error was not prejudicial.

A trial court generally has broad discretion concerning the admission of evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question . . . .' [Citations.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) Under this standard, the trial court's exercise of discretion "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citations.]" (*People v. Rodrigues*, *supra*, at pp. 1124-1125.)

A. Relevant Proceedings

During the prosecutor's direct examinations of the testifying accomplices, each accomplice made statements about the events surrounding the assault on Cano that the prosecutor contended were inconsistent with the witness's prior statement to the police. The prosecutor requested that the audiotape recordings of the accomplices' police

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[5] In light of our conclusion that the judgment against Daley must be reversed on the basis of the instructional error in CALCRIM No. 403, we need not consider Appellants' remaining arguments as they apply to Daley. However, we still must address such arguments as they apply to Garcia.

interviews be played for the jury and that the jury be provided with copies of the transcripts of those recordings. Defense counsel objected on the grounds that the prosecutor had failed to lay an adequate foundation for the prior inconsistent statement exception and had failed to establish that the entirety of the police statements were admissible.

The trial court admitted the complete tape recordings and transcripts of the accomplices' interviews with the police both as prior inconsistent statements and as prior consistent statements. The court reasoned that "[i]nconsistent statements come in as a matter of law. While it's hearsay, it's an exception to the rule. Consistent statements come in only when credibility is attacked . . . . It's apparent to me that the defense is going to attack credibility of every single one of these in-custody witnesses, so it may come in." The court later elaborated on its ruling, noting that "in my view there's been an enormous amount of inconsistency. To me, in my way of thinking, it's not even a close issue. Maybe to you or to somebody else but not to me. These individuals have not been, in my view, forthright in this courtroom in any way whatsoever. And what is the truth or not, I don't know. It's for the jury to figure out, but I haven't seen a lot of forthrightness."

B. Prior Inconsistent Statement Exception

A prior statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under Evidence Code sections 770 and 1235. (*People v. Ledesma* (2006) 39 Cal.4th 641, 711; *People v. Gonzalez* (2006) 38 Cal.4th 932, 949.) "Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are

evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

Garcia argues that the trial court erred in admitting the accomplices' statements to the police as prior inconsistent statements because their trial testimony was not evasive, but rather reflected an inability to recall all of the details of the crime, or was inconsistent with their prior police statements on only one point. However, the record demonstrates that there was a reasonable basis for the trial court to conclude that the accomplices' claimed lack of memory at trial amounted to a deliberate evasion, thus giving rise to an implied inconsistency. Moreover, each of the accomplices testified in a manner that expressly contradicted his prior statement to the police in several respects.

As for Bautista, he initially testified that he was not certain he saw Cano on the night of the assault. He also asserted that no one in his group was armed with a weapon that night. Bautista later admitted, however, that his fellow LMS members beat Cano to the ground during the fight, and that one of them had a bat and another had a knife. In addition, Bautista sought to minimize his involvement in the assault, stating that he never kicked Cano, but only tapped him with his toe. In his statement to the police, on the other hand, Bautista said that he kicked Cano once while several others in the group were beating him. In describing Garcia's involvement, Bautista testified that Garcia was merely "defending himself" during the fight, and that Garcia did not do anything other than "sock" Cano. In contrast, Bautista told the police that Garcia joined in the assault on Cano by stabbing him three times while Cano was on the ground.

Flores was also evasive and equivocal in his testimony. At trial, he stated that he went to Daley's home on his own accord because he had heard that some people were disrespecting her. In his prior statement to the police, Flores said that he went to Daley's home because his mother told him that Daley and her son had stopped by to pick him up while he was sleeping. Additionally, during his trial testimony, Flores denied that Daley told the LMS members who had congregated at her home "let's go," which directly contradicted his prior admission to the police that Daley made this statement. Flores further testified that when he and his fellow LMS members left Daley's home in her

vehicle, he did not know who was driving because he was drunk. On the other hand, Flores recounted to the police that Daley specifically drove the group from her home to the park so that they could fight with a rival gang.

Ross' trial testimony was similarly inconsistent with his police statement in several respects. At trial, Ross asserted that the LMS was a tagging crew, not a gang. In his statement to the police, Ross admitted that the LMS was "pretty much" a gang and agreed that its members were committing gang crimes. Ross further testified that when he joined his fellow LMS members in Daley's vehicle, they did not talk about anything while she was driving them to her home. According to Ross, he did not know where they were going or what they were going to do. Once at Daley's home, Ross heard that she had been disrespected by some LTs, but he maintained that they did not leave her home to start a fight and did not plan to retaliate against their rival gang. In contrast, during his interview with the police, Ross reported that when Daley initially picked him up, her son told him that the gang was going to have a "rumble" with the LTs. Ross also told the police that, as Daley was driving the group, they continually discussed how the LTs had disrespected Daley and her home.

As for Moran, he likewise testified that he and his fellow LMS members were merely hanging out at Daley's home and were not waiting for a fight with the LTs. Moran also stated that their sole purpose in leaving Daley's home was to cruise around the area in her car. Moran could not recall anyone telling him that Daley had been disrespected by a rival gang. On the other hand, in his interview with the police, Moran admitted that Daley's son called him because some LTs had disrespected Daley and that he and his gang went looking for the LTs for a fight. At trial, Moran further testified that Daley did not park her vehicle in the alley, but rather had to stop suddenly because the group jumped out of the car when they noticed some LTs near the park. Moran insisted at trial that Daley did not know what was happening during the incident. In his statement to the police, however, Moran said that Daley pulled the car over and let the group out when they saw the LTs on the street. Moran also told the police that he thought Daley knew the group was planning a gang fight.

We accordingly conclude that portions of each accomplice's statement to the police were admissible under the hearsay exception for prior inconsistent statements. However, not every statement made by the accomplices in their police interviews was either expressly or impliedly inconsistent with their trial testimony. The prior inconsistent statement exception "does *not* make admissible any prior statements of a witness that are *not* inconsistent with the witness' testimony, even though such *noninconsistent* statements are made at the same time and as a part of the same conversation in which the inconsistent statements are made. 'There is no justification for permitting a witness' prior inconsistent statement to make admissible *other* prior *statements* of the witness, even though made at the same time, that are *not* inconsistent with the witness' testimony and possess no more reliability than any other inadmissible hearsay statements.' [Citation.]" (*People v. Morgan* (1978) 87 Cal.App.3d 59, 75-76, disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498; see also *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1349 [Evidence Code section 1235 "does not permit the wholesale admission into evidence of entire works in which a statement appears"].) Only those portions of the prior statement that are actually inconsistent with the witness's trial testimony are admissible under the exception. The trial court thus erred in admitting the entirety of each accomplice's statement to the police as a prior inconsistent statement.

C. Prior Consistent Statement Exception

The Attorney General contends that other portions of the accomplices' statements to the police were separately admissible as prior consistent statements under Evidence Code sections 791 and 1236. Evidence Code section 791 permits a prior consistent statement to be introduced to support a witness's credibility if it is offered after an express or implied charge has been made that the witness's testimony at trial is fabricated or is influenced by bias or other improper motive. (Evid. Code, § 791, subd. (b).) The Attorney General reasons that courts repeatedly have permitted the admission of prior consistent statements under this exception where a party has suggested that a witness's favorable plea deal provided a motive to fabricate his or her trial testimony. However, a

prior consistent statement is not admissible on this basis until there has been a charge that the witness's trial testimony is fabricated or influenced by an improper motive. In this case, the trial court allowed each accomplice's prior statement to be introduced during the prosecution's direct examination before the defense had an opportunity to challenge that accomplice's credibility on cross-examination. While the trial court anticipated that defense counsel would attack the credibility of each testifying accomplice at some point, counsel had not stated such an intent on the record when that witness's prior statement was heard by the jury. Consequently, the accomplices' statements to the police were not admissible as prior consistent statements at the time the trial court admitted them into evidence.[6]

D. Non-Prejudicial Error

Although we conclude that the trial court erred in admitting the entirety of the accomplices' prior statements to the police, the error was not prejudicial to Garcia. If the trial court's admission of a hearsay statement solely violates state law, we apply the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, and reverse the conviction only if there is a reasonable probability that the verdict would have been more favorable to the defendant in the absence of the error. (*People v. Page* (2008) 44 Cal.4th 1, 48-49.) If, on the other hand, the error in admitting the evidence violated the defendant's federal constitutional rights, we must determine whether the error was harmless beyond a

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[6] In ruling on the admissibility of Moran's prior statement to the police, the trial court suggested that the statement might also be admissible as an admission of a co-conspirator, but did not explain the exact nature of the alleged conspiracy. To the extent the alleged conspiracy was the assault on Cano, the accomplice's statements to the police were made after the objective of the conspiracy had been completed, and thus, could not have been admissible as co-conspirator statements under Evidence Code section 1223. (Evid. Code, § 1223, subd. (a) ["Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if . . . made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy . . . ."].)

reasonable doubt under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Brown* (2003) 31 Cal.4th 518, 538.)

Garcia claims that the trial court's erroneous admission of the accomplices' entire police statements violated his Sixth Amendment right to confront witnesses against him. However, "[n]ot all erroneous admissions of hearsay violate the confrontation clause. [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 812.) "Where the witness is available at trial for cross-examination, the principal danger of admitting hearsay evidence is not present [citation], and neither the federal nor the state constitutional right of confrontation is violated. [Citations.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1118-1119.) In this case, each of the accomplices testified at trial and was available for cross-examination following the admission of his prior police statement. We therefore consider Garcia's claim of prejudice under the *Watson* standard for state law error.

Applying that standard, there is no reasonable probability that the admission of the accomplices' complete statements to the police affected Garcia's verdict. To the extent that the inadmissible portions of the statements tended to prove that Garcia fatally stabbed Cano during a gang confrontation, it was cumulative of other evidence establishing Garcia's guilt. Most notably, the audiotape and transcript of Garcia's own prior statement to the police was also admitted into evidence. In his interview with the police, Garcia recounted how he and other members of the LMS went looking for a gang fight with the rival LTs to retaliate against them for disrespecting one of their mothers. Garcia also admitted to the police that he was armed with a knife when the altercation began and that he stabbed Cano with the knife while Cano was on the ground being beaten by other LMS members. In light of such evidence, any error in admitting the entirety of the accomplices' prior statements to the police was not prejudicial to Garcia.

IV. Motion for Mistrial Based on Prosecutorial Misconduct

Garcia contends that the prosecution committed misconduct when it asked one of the accomplices in redirect examination whether he was aware that the sentence range for a murder conviction was 12-1/2 years to life. Garcia claims that, because the

prosecutor's inquiry misstated the law, the trial court either should have granted the defense motion for a mistrial or issued a curative instruction explaining the actual incarceration risk. We conclude that the prosecutor's question, although legally incorrect, did not amount to prejudicial misconduct under federal or state law because the trial court's ruling on the matter cured any potential harm.

During the cross-examination of each testifying accomplice, defense counsel elicited testimony that the accomplice originally had been charged with murder and had faced the prospect of life in prison before pleading guilty to a manslaughter charge in juvenile court. During the redirect examination of one of the accomplices, the prosecutor asked the witness if he was aware that the actual sentence range for murder was 12-1/2 years to life. Defense counsel immediately objected on the ground that the prosecutor's inquiry misstated the law. In response, the trial court stated on the record: "I don't know whether it does or doesn't but it's irrelevant at this point. Life is sufficient to be talking about at this point. Your next question." Defense counsel then requested a sidebar conference during which he asked the court to instruct the jury on the correct sentence range. The prosecutor explained that it was his understanding that a second degree murder conviction carried a possible prison term of 15 years to life with parole eligibility starting at 12 years. The court ordered the prosecutor to refrain from asking about sentence ranges. Defense counsel moved for a mistrial, which the court summarily denied.

The denial of a motion for a mistrial is reviewed for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 573; *People v. Ayala* (2000) 23 Cal.4th 225, 282.) "A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [Citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Avila*, *supra*, at p. 573.) "Prosecutorial misconduct may constitute an appropriate basis for a mistrial motion. [Citation.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1154.)

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) Reversal for prosecutorial misconduct is not required unless the defendant has been prejudiced thereby, that is "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

In this case, the parties do not dispute that the prosecutor incorrectly stated that murder could carry a prison term of 12-1/2 years. The proscribed minimum term of confinement for a second degree murder conviction is 15 years. (§ 190, subd. (a); Cal. Code Regs., tit. 15, § 2403, subd. (c).) Although a claim of prosecutorial misconduct may be based on a misstatement of the applicable law, the prosecutor's statement was not prejudicial to Garcia in light of the trial court's timely and appropriate response. In response to the prosecutor's misstatement about the possible sentence range for murder, the trial court promptly sustained defense counsel's objection and directed the prosecutor to move on to the next question. As a result, the witness never answered the prosecutor's improper inquiry about a 12-1/2-year incarceration risk. To the contrary, each of the accomplices testified during cross-examination that he faced a possible life sentence if tried and convicted of murder as an adult.

In sustaining defense counsel's objection, the trial court also informed the jury that the issue of 12-1/2 years was irrelevant because "[l]ife is sufficient to be talking about at this point." Thus, the trial court essentially issued the curative instruction sought by defense counsel immediately upon sustaining the objection. Additionally, the jury was instructed with CALCRIM No. 222, which explained that "[n]othing that the attorneys say is evidence . . . . Their questions are not evidence. Only the witnesses' answers are

evidence." (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153 ["To the extent one might possibly read . . . an improper insinuation into the prosecutor's statements, we note that the jury was instructed that the attorney's statements were not to be considered as evidence."].) CALCRIM No. 222 also instructed the jury that if the court sustained an objection to an attorney's question, the jury must ignore the question and not guess what the witness's answer might have been. We must presume that the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 [no prejudicial misconduct where prosecutor arguably misstated the law because "the trial court properly instructed the jury on the law, and we presume the jury followed those instructions"].) Under these circumstances, the prosecutor's misstatement did not render Garcia's trial fundamentally unfair, nor was it reasonably probable that Garcia would have obtained a more favorable result had the misstatement not occurred.

V. Sufficiency of the Evidence on the Gang Enhancement Allegation

Garcia challenges the sufficiency of the evidence supporting the gang enhancement allegation on two grounds. First, he contends that the evidence was insufficient to show that the "primary activities" of the LMS were to commit certain enumerated crimes within the meaning of section 186.22, subdivision (f). Second, he claims that there was insufficient evidence to prove he committed the charged offense with the "specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b). Neither argument has merit.

A. Standard of Review

The California Street Terrorism Enforcement and Prevention Act was enacted by the Legislature "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement provision for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal,

having as one of its primary activities the commission of one or more of the criminal acts enumerated in [§ 186.22, subd. (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

In assessing the sufficiency of the evidence in a criminal case, "'we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We must presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for a lack of sufficient evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard of review applies to a claim of insufficient evidence to support a gang enhancement allegation. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

B. Primary Activities of the Gang

To establish that a gang is a "criminal street gang," the prosecution must prove that the gang has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and that it has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations," as opposed to the occasional commission of those crimes by one or more of the group's members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.)

Garcia asserts that there was insufficient evidence that the LMS's primary activities included the commission of one or more of the criminal acts enumerated in section 186.22, subdivision (e) because the prosecution's gang expert failed to use the term "primary" in describing the gang's criminal activities. However, Garcia provides no

authority for the proposition that a gang expert must quote the language of section 186.22 verbatim to satisfy the "primary activities" element of the statute. In fact, in *People v. Margarejo* (2008) 162 Cal.App.4th 102, this Court rejected a similar argument. As we explained, "[o]rdinary human communication often is flowing and contextual. Jurors know this. Repetitive and stilted responses make up one kind of direct examination, but not the only kind. [The appellant's] objection here calls for an unreasonably restrictive interpretation of [the expert's] answer, which we respectfully decline." (*Id*. at p. 107.)

Here, in response to the prosecutor's question about the "common activities" of the LMS, Officer Zamora testified: "I have seen violent crimes, physical assaults, I have also seen auto theft, auto burglary, these are very common with young Hispanic neighbors that are starting out. These are the type of crimes it is very common that they commit such as strong armed robberies or possession of illegal firearms as well as heavily involved in graffiti." Although Officer Zamora did not use the words "primary activities" in answering the prosecutor's question, it is clear that his use of the phrase "very common" was intended to refer to criminal activities that the LMS committed "consistently and repeatedly," rather than on an occasional or sporadic basis. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.)

Alternatively, Garcia argues that the evidence was insufficient on the "primary activities" element because the prosecution failed to prove that both the charged crime of murder and the two predicate crimes of driving a stolen vehicle and possessing a concealed firearm were among the primary activities of the LMS. However, section 186.22 does not provide that either the charged offense or the two predicate offenses used to establish a "pattern of criminal gang activity" under subdivision (e) must be the same as the crimes constituting the gang's "primary activities" under subdivision (f). The statute simply requires that the criminal acts relied on to satisfy both the "primary activities" element and the "pattern of criminal gang activity" element be among those enumerated in subdivision (e). In any event, the crimes of physical assault, driving a stolen vehicle, and illegal firearm possession were essentially the same as those identified

by Officer Zamora as the common activities of the gang. Accordingly, the evidence was sufficient to establish the "primary activities" prong of the gang enhancement allegation.

C. Specific Intent to Promote or Assist Any Criminal Gang Conduct

To obtain a true finding on the gang enhancement allegation, the prosecution also had to prove that the charged offense was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Citing Ninth Circuit authority, Garcia claims that Officer Zamora's testimony that the murder of Cano benefited the gang was not sufficient to show that Garcia acted with the specific intent to facilitate other gang crimes. In the federal cases relied on by Garcia -- *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 and *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 -- the Ninth Circuit held that the specific intent requirement of section 186.22 was not satisfied unless there was some evidence, "aside from the gang expert's generic testimony, 'that would support an inference that [the defendant] robbed [the victim] with the specific intent to facilitate other criminal conduct by the [gang].'" (*Briceno v. Scribner*, *supra*, at p. 1079, quoting *Garcia v. Carey*, *supra*, at p. 1103.) According to the Ninth Circuit, the gang enhancement statute requires, among other things, evidence describing "'what criminal activity of the gang was . . . intended to be furthered'" by the charged offense. (*Briceno v. Scribner*, *supra*, at p. 1079, quoting *Garcia v. Carey*, *supra*, at p. 1103.)

However, numerous California appellate courts have rejected the Ninth Circuit's reasoning.[7] (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354; *People v. Romero* (2006) 140 Cal.App.4th 15, 19; *People v. Hill* (2006) 142 Cal.App.4th 770, 774.) Instead, these California courts have recognized that "[b]y its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct. [Citation.]" (*People v.*

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[7] Cases from the Federal Circuit courts do not bind this Court, although they are often persuasive authority. (See *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

Romero, *supra*, at p. 19.) "There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (*People v. Vazquez*, *supra*, at p. 354; see also *People v. Hill*, *supra*, at p. 774 ["There is no requirement in section 1866.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits."].)

We agree with these California cases that the gang enhancement statute, by its express terms, does not require a showing that Garcia intended to assist or encourage his fellow gang members in the commission of any crimes other than the charged offense. Furthermore, based on the evidence offered at trial, the jury reasonably could have concluded that Garcia intended for the assault on Cano to elevate and enhance his own reputation within the LMS and the gang's reputation within the local community, thus facilitating future crimes to be committed by Garcia and his fellow gang members. (See *People v. Vazquez*, *supra*, 178 Cal.App.4th at p. 354 [expert testimony that violent crimes increase respect for the gang and intimidate neighborhood residents was sufficient to support inference that defendant "specifically intended for the murder to promote [his gang's] criminal activities"].) In sum, the jury's true finding on the gang enhancement allegation against Garcia was supported by substantial evidence.

VI. CALCRIM No. 220 – Reasonable Doubt

Garcia next argues that the version of CALCRIM No. 220 issued to the jury was legally erroneous because it failed to instruct the jury that the prosecution had to prove each element of the charged crimes beyond a reasonable doubt.[8] However, several

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[8] Using the language of CALCRIM No. 220, the trial court instructed the jury as follows: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt . . . . In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty." In other instructions, the

appellate courts have rejected the argument raised by Garcia here. (See, e.g., *People v. Henning* (2009) 178 Cal.App.4th 388, 406; *People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088-1089.) We agree with the reasoning in these cases that, when considered as a whole, the instructions adequately informed the jury of the applicable law.

Reading the instructions as a whole, there is no reasonable likelihood the jury misunderstood or misapplied the prosecution's burden of proof. In CALCRIM No. 220, the jury was informed that it had to impartially compare and consider all of the evidence in deciding whether the prosecution proved its case beyond a reasonable doubt, and that unless the evidence established the defendants' guilt beyond a reasonable doubt, they were entitled to an acquittal. In the other instructions, the jury was provided with a list of the elements of the charged crimes and the gang enhancement allegations, and was informed that the prosecution had the burden of proving each of those elements. The instructions thus correctly explained that each element of the charged offenses had to be proven beyond a reasonable doubt.

Contrary to Garcia's claim, none of the instructions reasonably could be construed as requiring a lesser standard of proof. Garcia notes the gang enhancement instruction specifically stated that the prosecution had to prove each allegation beyond a reasonable doubt, whereas the murder instruction was silent with respect to the standard of proof. He reasons that the jury might have assumed from these instructions that proof beyond a reasonable doubt was not required for murder. We disagree. The jury clearly was instructed in CALCRIM No. 220 that the prosecution had the burden of proving its case beyond a reasonable doubt. If anything, the reference to the beyond-a-reasonable-doubt standard in the other instructions served to reinforce the jury's understanding of the proper burden of proof. Therefore, when considered with the other instructions,

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trial court enumerated each of the elements of the charged crimes and the gang enhancement allegations, and explained that the prosecution had to prove each of those elements in order for the jury to find the defendants guilty.

CALCRIM No. 220 adequately informed the jury that the prosecution was required to prove each element of the charged offenses beyond a reasonable doubt.

VII. Cumulative Error

Garcia last contends that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Whether considered individually or for their cumulative effect, however, none of the errors alleged affected the process or accrued to Garcia's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As the California Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Garcia received a fair trial.

DISPOSITION

The judgment as to Daley is reversed. The judgment as to Garcia is affirmed.

ZELON, J.

I concur:

JACKSON, J.

PERLUSS, P. J., Concurring in part and Dissenting in part.

I fully concur with the majority's opinion affirming the conviction of Heriberto Garcia for second degree murder. Because I do not believe it is reasonably likely the jury construed former CALCRIM No. 403 in a manner that violated Eva Daley's rights, I respectfully dissent from the reversal of her murder conviction.

Daley was charged and tried for the murder of José Cano based on evidence she had personally aided and abetted codefendant Garcia's commission of the murder and on the alternate theory she had aided and abetted an assault on Cano (either a simple assault or an aggravated assault with a deadly weapon or by means of force likely to produce great bodily injury) and that murder was the natural and probable consequence of the target offense she committed. "[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

To convict the defendant under this alternate theory, a jury "must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 262, fn. omitted.) A charged crime (here, the murder of Cano) is a natural and probable consequence of a target crime if it was reasonably foreseeable that the charged crime would be committed. "The . . . question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Mendoza* (1998)

18 Cal.4th 1114, 1133; see *People v. Medina* (2009) 46 Cal.4th 913, 916 [murder can be a natural and probable consequence of simple assault in case involving gang attack].)

Daley's jury was instructed under a modified version of former CALCRIM No. 403 that to find her guilty of murder under the natural and probable consequences doctrine the People had to prove beyond a reasonable doubt that (1) Daley was guilty of aiding and abetting an assault or assault with force likely to produce great bodily injury or assault with a deadly weapon, (2) the murder of Cano occurred during the commission of the assault or assault with force likely to produce great bodily injury or assault with a deadly weapon, and (3) under all the circumstances a reasonable person in Daley's position would have known that the commission of the murder was a natural and probable consequence of the commission of assault or assault with force likely to produce great bodily injury or assault with a deadly weapon. The court also instructed, in the critical language for purposes of this case, "The defendant is guilty of murder if you decide that the defendant aided and abetted one of these crimes and the murder was a natural and probable result *of one of these crimes*. However, you do not need to agree about which of these crimes the defendant aided and abetted." (Italics added.)[1]

Daley argues—and the majority agrees—former CALCRIM No. 403 suggested a theory of liability that is legally incorrect. That is, the instruction allowed the jury to conclude Daley had aided and abetted only a simple assault (but did not aid and abet an

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[1] In a revision effective April 23, 2010 this portion of CALCRIM No. 403 was modified to read, "If you decide that the defendant aided and abetted one of these crimes and that <insert non-target offense> was a natural and probable consequence *of that crime*, the defendant is guilty of <insert non-target offense>. You do not need to agree about which of these crimes the defendant aided and abetted." (Italics added.)

This revision to CALCRIM No. 403 was included in a package of three newly drafted or substantially revised criminal jury instructions and 35 revised instructions forwarded to the Judicial Council for its approval on March 24, 2010 by the Advisory Committee on Criminal Jury Instructions. The six-page transmittal report from the Advisory Committee, which discussed a number of the proposed changes, did not address CALCRIM No. 403.

assault with a deadly weapon or an assault by means of force likely to produce great bodily injury) and convict her of murder even if it concluded that murder was not a natural and probable consequence of simple assault but was a natural and probable consequence of either form of aggravated assault identified in the instruction. Based on this potential ambiguity in former CALCRIM No. 403 and the complexity of the law regarding aiding and abetting a murder under the natural and probable consequences doctrine, the majority reverses Daley's murder conviction. I do not believe a reversal is appropriate.[2]

As the majority explains, when, as here, instructions are potentially ambiguous or misleading, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights." (*People v. Rogers* (2006) 39 Cal.4th 826, 873; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385] ["in reviewing an ambiguous instruction . . . , we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution"].) In evaluating whether there is a reasonable likelihood the jury misapplied the trial court's instructions, we look to the entire record of the trial, including the arguments of counsel. (*People v. Young* (2005) 34 Cal.4th 1149, 1202 ["reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"]; accord, *People v. Franco* (2009) 180 Cal.App.4th 713, 720; *People v. Stone* (2008) 160 Cal.App.4th 323, 331.) Additionally, we must assume the jurors are intelligent persons, capable of understanding and correlating all the

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[2] Daley also argues murder, as a matter of law, cannot be a natural and probable consequence of a simple assault—an argument rejected by the Supreme Court in *People v. Medina, supra*, 46 Cal.4th 913. She does not contend the evidence at trial was insufficient to support a finding that Cano's murder was a natural and probable consequence of simple assault under the circumstances of this case. (See *id.*, at p. 927 ["the ultimate factual question is one of reasonable foreseeability, to be evaluated under *all* the factual circumstances of the case"].)

instructions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

The majority and Daley are, of course, correct that read literally former CALCRIM No. 403 permitted the jury to convict Daley of murder even if it found she had aided and abetted only a simple assault and also concluded under the circumstances of this case that murder was not a natural and probable consequence of that simple assault. But I cannot agree it is reasonably likely the jury misapplied the instruction in this manner.

First, the jury was clearly told this alternate basis for finding Daley guilty was the "natural and probable consequences theory" and was instructed "a natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." Assuming, as we must, that the jurors are intelligent individuals and that they understood both the meaning of the word consequence itself[3] and the court's definition of a natural and probable consequence (see *People v. Griffin* (2004) 33 Cal.4th 1015, 1022 ["there is no duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions"]), it seems highly unlikely the jury would conclude Daley was guilty of murder even though Garcia's fatal stabbing of Cano was not the natural and probable result of a predicate crime for which Daley had responsibility. That is, the jury instructions considered as a whole, notwithstanding the possible ambiguity created by finely parsing the language of former CALCRIM No. 403, adequately informed the jury Daley was guilty of murder under this theory only if Cano's murder was the natural and probable consequence of a target crime Daley had actually aided and abetted.

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[3] Oxford Dictionaries Online defines "consequence" as "a result or effect of an action or condition." (Oxford Dictionaries < http://www.oxforddictionaries.com> (as of July 27, 2010); see generally *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["[w]hen attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].)

Any residual uncertainty about the meaning of the court's instruction, moreover, was eliminated entirely by counsel's closing arguments, given after the court had instructed the jury on all substantive aspects of the case. As the majority acknowledges, the prosecutor did not contend Daley could be convicted of murder if she had committed one target offense (simple assault) and murder was the natural and probable consequence of a different target offense (aggravated assault)—the potential ambiguity identified in the challenged instruction—but rather argued murder was a natural and probable consequence of all three possible target crimes (simple assault, assault with a deadly weapon and assault by means likely to produce great bodily injury) under the circumstances of this case. However, in language strikingly similar to that used in revised CALCRIM No. 403, quoted in footnote 1, above, the prosecutor also told the jury it could convict Daley of murder if she aided and abetted Garcia in committing "one of those three target offenses" and murder was a natural and probable consequence "*of that assault*." (Italics added.)

Similarly, focusing specifically on the possibility the jury might conclude Daley had aided and abetted a simple assault, but not either an assault with a deadly weapon or an assault by means of force likely to produce great bodily injury, her defense counsel explained, "[F]or you people that decide that it was an assault, maybe all of you, that was contemplated, that was a target crime, if for some reason you believe that she knew there was going to be a fight, then you have to decide whether a murder is a natural and probable consequence foreseeable to a person in the same situation as Mrs. Daley was. *Before you ever get to convict her, you have to decide that murder is the natural and probable consequence of a fist fight.*" (Italics added.) That argument could leave no doubt that, if simple assault was the only target crime Daley aided and abetted, then she could be found guilty of murder only if the jury also found that murder was a natural and probable consequence of simple assault.

The majority essentially ignores the prosecutor's explanation and minimizes the significance of defense counsel's argument in assessing the likely impact of former

CALCRIM No. 403, dismissing it as "an accurate statement of the law [but] not a model of clarity." To the contrary, in my view the prosecutor's and defense counsel's arguments cured any potential ambiguity in the instructions given by the court. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1202.)

Accordingly, I would affirm the judgments as to both Daley and Garcia.

PERLUSS, P. J.